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No. 96-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATEMENT

Petitioners Daniel M. Paradies, The Paradies Shops, Inc., and Paradies Midfield Corporation file this supplemental brief pursuant to Supreme Court Rule 15.8 to inform this Court of a legal development subsequent to the filing of their papers in this case. At the time that petitioners submitted their petition for writ of certiorari and reply brief, one of the cases cited in those briefs, *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996), had been argued to the Fifth Circuit *en banc* but had not been decided. On June 18, 1997, the Fifth Circuit announced its *en banc* decision in *Brumley*, reversing the panel opinion. The *en banc* opinion is reported at 116 F.3d 728 (1997), *petition for cert. filed* (U.S. Sept. 15, 1997) (No. 97-486).

The defendant in *Brumley* was convicted of mail fraud for "conspiring to defraud the citizens of the State of Texas of honest services." 116 F.3d at 730. The Fifth Circuit panel reversed the conviction, holding that Congress' 1988 enactment of § 1346 did not encompass state or local citizens who had been "deprived of the honest services of their public officials." *Id.* at 730 (citing *Brumley*, 79 F.3d at 1441-42). The *Brumley en banc* majority disagreed with this panel holding.

Judge Higginbotham's opinion for the *en banc* majority concluded that Congress intended in 1988 to overturn this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), by passing 18 U.S.C. § 1346. The majority limited its holding, however, by noting that a prerequisite to an "honest services" conviction is that the "official must act or fail to act contrary to the requirements of his job under state law." *Id.* at 734. This prerequisite was met in *Brumley* because the district court had found a violation of the Texas penal code. *Id.* at 735-36.

Judges Jolly and DeMoss, joined by Judge Smith, dissented from what they deemed "an issue-evasive and jurisprudentially flawed majority opinion." *Id.* at 736. They argued that both *McNally* and *Carpenter v. United States*, 484 U.S. 19 (1987), when read in conjunction with the principle of lenity and this Court's federalism jurisprudence, required that Congress be "unmistakably clear in the language of the statute" if it wished to

criminalize conduct traditionally reserved for state criminal laws. *Id.* at 740. In the dissent's view, § 1346 failed to meet this standard because, on its face, it "produce[d] numerous ambiguities and questions." *Id.* at 740. Moreover, the legislative history of § 1346 illustrated that Congress indeed knew "how to 'speak clearly and definitively'" but chose not to do so. *Id.* at 745.

DISCUSSION

1. As explained in the petition, certiorari should be granted to decide the § 1346 issue because the decision below is "inconsistent with *McNally v. United States* and other applicable decisions of this Court." Pet. at 6. *McNally* requires that Congress speak with special clarity when it proposes to alter the federal-state balance in the area of criminal law. Congress did not do so when it enacted § 1346. Regardless of whether the decision conflicts with *Brumley* or any other court of appeals decision, the issue whether § 1346 legislatively overruled *McNally* is one of critical importance that must be decided by this Court. Indeed, in *McNally* itself, the Court granted review in the absence of a circuit conflict and reached a result contrary to the unanimous weight of circuit court authority. *See McNally*, 483 U.S. at 364 (Stevens, J., dissenting). The *Brumley en banc* opinions confirm that this is a significant and substantial issue on which reasonable judges can and do disagree. *See, e.g.*, 116 F.3d. at 742, 746 (dissenting opinion) (accusing majority of an "egregious error," finding majority's conclusion "incomprehensible," and noting that the majority "closed [its] eyes to obvious ambiguities in the text of 28 U.S.C. § 1346"). If, as petitioners contend, § 1346 did *not* overrule *McNally*, then it is critical for this Court to resolve that issue now and put a stop to inappropriate prosecutions.

2. Moreover, while there is no longer the same disagreement between *Brumley* and the decision below that existed at the time that the petition was filed, the analyses of the Fifth and Eleventh Circuits remain in conflict with respect to the reach of § 1346. Although the *Brumley en banc* majority held that Congress had overruled *McNally* when it enacted § 1346, it still felt compelled

— based on concerns of federalism — to impose substantial limits on the scope of § 1346 to prevent the federal government from "impos[ing] upon states a federal vision of appropriate services — to establish, in other words, an ethical regime for state employees." 116 F.3d at 734. Accordingly, the *en banc* court held that "a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.*[1]

By contrast, the courts below recognized no such limitation. The government alleged that petitioners had aided and abetted the mail fraud of defendant Ira Jackson, who was alleged to be a fiduciary of the City of Atlanta. *See* Pet. App. at 26a. In its jury instructions, the trial court stated that "a fiduciary's duty to disclose material information to his principal need not be created by local, state or federal law." (R48-4256). This approach — which led to petitioners' convictions — cannot be reconciled with the more restrictive reading of § 1346 adopted in *Brumley*. Nor can it be reconciled with *McNally* itself. As petitioners have argued (Pet. at 15), in *McNally* this Court specifically identified the situation involving state or local officials who are not accused of violating state law as requiring "a much clearer indication" from Congress before such defendants could be subject to federal prosecution. *McNally*, 483 U.S. at 361 n.9.

Thus, this case presents this Court with the opportunity to determine not only whether Congress intended to overrule *McNally* by enacting § 1346, but also (if the Court rejects petitioners' contention that Congress did not so intend) to clarify the permissible scope of prosecution under § 1346. *See* Pet. 6 & n.2, 12. The *Brumley en banc* opinions only confirm that these issues are important and should be resolved by this Court.

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[1] The *Brumley* majority noted that the defendant's conduct constituted a Texas criminal offense and that the district court had found a violation of the Texas penal law. *Id.* at 735-36.

CONCLUSION

For the foregoing reasons and those given in the petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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